Majlis Perbandaran Subang Jaya v Laguna De Bay Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–162–04 OF 2013
BALIA YUSOF, HAMID SULTAN AND ABANG ISKANDAR JJCA
25 NOVEMBER 2014

Local Government — License — Signboard and advertisements — Avertising billboard built on state land — Claim for annual fee — Sublicense agreement contained illogical, unfair, prejudicial terms — Local authority warned respondent that sublicense agreement would be revoked if not signed — Whether local authority acted ultra vires its powers — Whether local authority acted illegally and/or in contravention of law — Whether local authority acted unreasonably, grossly disproportionately and was motivated by irrelevant factors

The appellant was a local authority while the respondent was involved in erecting outdoor advertising billboard and earning an income through its clients who place the advertisement on the billboard. The case concerns the licensing of an outdoor advertising billboard built by the respondent on a state land. The respondent received a letter from the appellant charging a sum of RM254,600 as 'Bayaran Perkongsian Tapak' for the year 2009, in addition to the annual fee of RM32,000 for TOL, structural permit and advertising license. The respondent refused to pay. The total payable amount was reduced to RM33,000 which the respondent paid and was acknowledged by the appellant. The appellant made an offer to the respondent again for tenancy of the site ('the offer letter') containing a different permutation. The respondent wrote to the appellant again on the premise that there was in substance no change to the charges being imposed on it accepted the offer and enclosed payment of RM33,000 for year 2010. In early 2011, the appellant asked to be furnished with the respondent's contract with its customers to determine if RM33,000 or 25% levy was applicable. The respondent replied by letter stating that it would pay whatever was prescribed by law and enclosed payment of RM33,000 which the appellant accepted. However, six months later the appellant issued a letter directing the respondent to attend at the appellant's office within 14 days for the purpose of entering into an agreement with the appellant. The agreement was not provided and only upon the respondent's request did the respondent subsequently receive a draft copy ('sublicense agreement') which provided for the imposition of 25% levy plus the TOL fee or RM33,000 whichever was higher. The sublicense agreement also contained other terms which were illogical, unfair, prejudicial to the respondent. Given the manifest unreasonableness of the sublicense agreement, the respondent tried to seek clarifications from the appellant on the terms but to not avail. Eventually the appellant gave a warning to the respondent that it would revoke

its offer and evict the respondent from the site if the sublicense agreement was not signed. The respondent filed a judicial review application based on this decision but at the leave stage the Attorney General's office objected to it on the grounds that it was premature. The judge was satisfied that the three grounds put forward by the respondent had been made out, namely that in imposing the sublicense agreement on the respondent, the appellant had acted ultra vires its powers; had acted illegally and/or in contravention of the law; had acted unreasonably, grossly disproportionately and was motivated by factors which were irrelevant. Hence, the present appeal.

Held, allowing the appeal with costs here and below:

(1) The Local Government Act 1976 ('the LGA') gives the local authority at least two types of powers. One to function within the provision of the Act in matters relating to the local authority and the public. When exercising this power it is trite that it can only act according to the laws that govern it and the decision will be subject to judicial review. The other power given under s 13 of the LGA to local authorities is the power of a body corporate and that will be the powers vested in any corporation and has nothing to do with public rights or obligations or interest (see paras 15(a) & (b)).

(2) Section 13 of the LGA was not addressed in the case of *Penang Development Corporation v Teoh Eng Huat & Anor* [1992] 1 MLJ 749 and in consequence the case has limited application to the facts of the instant case. As a general rule, a body corporate, if separate legal entity principles apply, can enter into any form of transaction with private parties on such terms and conditions and such matters if it is a state corporation will usually be a policy matter in relation to state authority or local authority by the state government. Such powers exercised as body corporate could not be challenged by way of judicial review. This can be 'expressly or reasonably inferred' in s 13 of the LGA which gives the powers of separate legal entity principle (see para 15(b)).

(3) The public function of local authorities and its function as a body corporate (legal entity) must be distinguished. The function of a body corporate is not synonymous with the function of local authorities. The respondent's argument that there is no single express provision allowing the appellant to enter into the business of renting TOLs to billboard operators cannot be correct. Being a separate legal entity, they can enter into commercial contracts but it will be subject to the control of the state government and/or state authority itself and the policy of the day. If such policy consideration relates to private contracting parties as opposed to public then as a general rule it will not be amenable to judicial review (see para 15(e)).

(4) The appellant posses the requisite legal rights in respect of the land and the respondent will be given a license to erect the billboard and not 'occupy land' (at the exclusion of others) as in the case of TOL is granted under s 68 of the National Land Code ('the NLC'). The sublicense agreement is not an assignment of any rights as alleged by the respondent to attract s 68 of the NLC. On the issue of illegality, the complaint of the respondent is sublicense agreement relates to TOL and s 68 does not permit the TOL holder to assign the right for a rent. The judgment failed to take into account that the issue here involved a contractual deal and not a deprivation or infringement of a right by administrative action that the respondent was entitled in law, to attract the jurisprudence relating to judicial review (see paras 8, 15(h) & 16).

[Bahasa Malaysia summary

Perayu adalah pihak berkuasa tempatan manakala responden terlibat dengan menaikkan papan iklan luar dan memperoleh pendapatan melalui pelanggan yang meletakkan iklan pada papan iklan itu. Kes ini berkenaan pelesenan papan iklan luar yang dibina oleh responden atas tanah kerajaan. Responden telah menerima surat daripada perayu mengenakan caj sejumlah RM254,600 sebagai 'Bayaran Perkongsian Tapak' bagi tahun 2009, selain daripada yuran tahunan untuk RM32,000 untuk TOL, permit struktur dan lesen pengiklanan. Responden enggan membayar. Keseluruhan jumlah yang kena dibayar telah dikurangkan kepada RM33,000 yang mana telah dibayar oleh responden dan telah diakui oleh perayu. Perayu telah membuat tawaran kepada responden sekali lagi untuk sewaan kawasan itu ('surat tawaran') yang mengandungi pilih atur yang berbeza. Responden telah menulis kepada perayu sekali lagi atas premis bahawa tidak terdapat perubahan pada caj yang dikenakan ke atasnya untuk menerima tawaran itu dan bayaran yang disertakan sejumlah RM33,000 bagi tahun 2010. Pada awal 2011, perayu meminta untuk diberikan kontrak responden dengan pelanggannya bagi menentukan jika RM33,000 atau 25% levi adalah terpakai. Responden menjawab melalui surat menyatakan bahawa ia akan membayar apapun yang ditetapkan oleh undang-undang dan bayaran yang disertakan sebanyak RM33,000 yang diterima oleh perayu. Walau bagaimanapun, enam bulan kemudian perayu telah mengeluarkan surat mengarahkan responden hadir di pejabat perayu dalam tempoh 14 hari bagi tujuan memasuki perjanjian dengan perayu. Perjanjian tidak diberikan dan hanya selepas permintaan responden barulah akhirnya salinan draf itu ('perjanjian sublesen') diterima oleh responden yang memperuntukkan bagi pengenaan 25% levi berserta yuran TOL atau RM33,000 yang mana lebih tinggi. Perjanjian sublesen itu juga mengandungi terma lain yang tidak logikal, tidak adil, menjejaskan responden. Berdasarkan perjanjian sublesen yang tidak munasabah itu, responden cuba untuk meminta penjelasan daripada perayu berhubung terma-terma itu tetapi tidak dapat. Akhirnya perayu memberi amaran kepada responden bahawa ia akan membatalkan tawarannya dan menghalau responden daripada kawasan

itu jika perjanjian sublesen itu tidak ditandatangani. Responden telah memfailkan permohonan semakan kehakiman berdasarkan keputusan ini tetapi di peringkat kebenaran Pejabat Peguam Negara membantahnya atas alasan bahawa ia adalah pramatang. Hakim berpuas hati bahawa tiga alasan itu dikemukakan oleh responden telah disediakan, iaitu dengan mengenakan perjanjian sublesen ke atas responden, perayu telah bertindak ultra vires kuasanya; telah bertindak menyalahi undang-undang dan/atau bertentangan dengan undang-undang; telah bertindak tidak munasabah, amat tidak seimbang dan didorong oleh faktor-faktor yang tidak relevan. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Akta Kerajaan Tempatan 1976 ('AKT') memberikan pihak berkuasa tempatan sekurang-kurangnya dua jenis kuasa. Satu adalah untuk berfungsi dalam peruntukan Akta berhubung perkara berkaitan pihak berkuasa tempatan dan pihak awam. Apabila menggunakan kuasa ini adalah nyata ia hanya boleh bertindak menurut undang-undang yang mengawal dan keputusan itu tertakluk kepada semakan kehakiman. Kuasa lain yang diberikan di bawah s 13 AKT kepada pihak berkuasa tempatan adalah kuasa badan korporat dan ia akan menjadi kuasa yang diberikan dalam mana-mana perbadanan dan tiada kaitan dengan hak atau obligasi atau kepentingan awam (lihat perenggan 15(a) & (b)).

(2) Seksyen 13 AKT tidak dinyatakan di dalam kes *Penang Development Corporation v Teoh Eng Huat & Anor* [1992] 1 MLJ 749 dan akibatnya kes itu mempunyai pemakaian terhad kepada fakta kes ini. Sebagai rukun am, satu badan korporat, jika prinsip entiti undang-undang berasingan terpakai, boleh memasuki mana-mana bentuk urus niaga dengan pihak-pihak persendirian atas terma-terma dan syarat-syarat sedemikian dan perkara-perkara tersebut jika ia adalah perbadanan kerajaan akan biasanya menjadi perkara polisi berkaitan pihak berkuasa negeri atau pihak berkuasa tempatan oleh kerajaan negeri. Kuasa-kuasa tersebut yang dilaksanakan sebagai badan korporat tidak boleh dicabar melalui semakan kehakiman. Ini boleh 'expressly or reasonably inferred' dalam s 13 AKT yang memberikan kuasa-kuasa prinsip entiti undang-undang berasingan (lihat perenggan 15(b)).

(3) Fungsi awam pihak berkuasa tempatan dan fungsinya sebagai badan korporat (entiti undang-undang) perlu dibezakan. Fungsi badan korporat tidak sinonim dengan fungsi pihak berkuasa tempatan. Hujah responden bahawa tiada satu peruntukan nyata yang membenarkan perayu memasuki perniagaan menyewa TOL kepada operator papan iklan tidak boleh diperbetulkan. Sebagai entiti undang-undang yang berasingan, mereka boleh memasuki kontrak komersial tetapi ia adalah

tertakluk kepada kawalan kerajaan negeri dan/atau pihak berkuasa negeri itu sendiri dan polisi semasa. Jika pertimbangan polisi tersebut berkaitan pihak-pihak yang berkontrak persendirian berbanding awam maka secara amnya ia akan tidak bersetuju dengan semakan kehakiman (lihat perenggan 15(e)).

(4) Perayu mempunyai hak undang-undang yang diperlukan berkaitan tanah dan responden akan diberikan lesen untuk menaikkan papan iklan dan tidak 'occupy land' (dengan mengecualikan yang lain) seperti dalam kes TOL diberikan di bawah s 68 Kanun Tanah Negara ('KTN'). Perjanjian sublesen bukan penyerahhakan apa-apa hak sebagaimana dikatakan oleh responden untuk menggunakan s 68 KTN. Berhubung isu ketaksahan, aduan responden adalah perjanjian sublesen berkaitan TOL dan s 68 tidak membenarkan pemegang TOL untuk menyerah hak untuk sewaan. Penghakiman itu gagal mengambil kira bahawa isu ini melibatkan urusan kontraktual dan bukan kilanan atau pelanggaran hak melalui tindakan pentadbiran yang responden berhak dari segi undang-undang, untuk menarik jurisprudens berkaitan semakan kehakiman (lihat perenggan 8, 15(h) & 16).]

Notes

For cases on signboard and advertisement, see 10 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 94–96.

Cases referred to

Aluminium Company of Malaysia Bhd v Ng Than Chai & Anor [1994] 3 MLJ 544; [1994] 4 CLJ 97, HC (refd)

Ang Toon Chew & Sons (M) Sdn Bhd v Personal Representatives of Mohamed Taib bin Yosoff, deceased [1998] 5 MLJ 481, HC (refd)

Ayr Harbour Trustees v Oswald (1883) 8 App Cas 623, HL (refd)

Capital Billboards Sdn Bhd v Asia Posters Sdn Bhd & Ors [2012] MLJU 385, HC (refd)

Chong Chung Moi @ Christine Chong v The Government of State of Sabah & Ors [2007] 5 MLJ 441, HC (refd)

Generation Products Sdn Bhd v Majlis Perbandaran Klang [2008] 6 MLJ 325, FC (refd)

Marble Terrazzo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors [1991] 1 MLJ 253, HC (refd)

Murugesan v Krishnasamy & Anor [1958] 1 MLJ 92 (refd)

Paruvathy d/o Murugiah v Krishnan s/o Doraisamy [1983] 2 MLJ 121, FC (refd)

Penang Development Corporation v Teoh Eng Huat & Anor [1992] 1 MLJ 749, HC (refd)

Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors [2014] 3 MLJ 661, CA (refd)

Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707, CA (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
United Overseas Bank (M) Bhd v Mok Hue Huan & Anor [2010] 7 MLJ 293, HC (refd)
Vijay Kumar Gupta v State of Maharashtra [2008] (3) All 240, HC (refd)
Wenlock (Baroness) v River Dee Co (1885) 10 App Cas 354, HL (consd)

Legislation referred to

Chennai City Municipal Corporation Act 1919 [IND] s 4(2)
Companies Act 1965 s 20
Federal Constitution
Interpretations Act 1948 and 1967
Laws of the Constitution of Selangor 1959
Local Government Act 1976 ss 9, 9(1), 13
Madurai Municipal Corporation Act 1971 [IND] s 3(2)
National Land Code ss 5, 65, 66, 67, 68, 69
Street, Drainage and Building Act 1974
Subang Jaya Municipal Council By-Law 2007
Town and Country Planning Act 1976 ss 19, 20, 21
Uniform Building By-Law 1984

Appeal from: Application for Judicial Review No 25–98–05 of 2012 (High Court, Shah Alam)

P Lathika (Lathika & Assoc) for the appellant.
Preetha Pillai (Vivian Siew with her) (Skrine) for the respondent.

Hamid Sultan JCA:

[1] The appellant's appeal against the decision of the learned High Court judge allowing the judicial review application in respect of the decision of the appellant to impose 25% of the gross revenue charged by the respondent to its clients for the site rental fee came up for hearing on 13 October 2014 and upon hearing able submissions by both parties, we reserved judgment. My learned brothers Balia Yusof bin Hj Wahi JCA and Abang Iskandar bin Abang Hashim JCA have read the draft judgment and approved the same. This is our judgment.

[2] The instant case is related to a rental agreement ('private law') which the respondent has refused to sign on the basis that the appellant is in breach of law and has not provided favourable terms to the respondent as was done in earlier transactions. In essence, the complaint is related to a contractual license (ie willing licensor and willing licensee) and has nothing to do with an

infringement of the right of the respondent in an administrative decision per se for the complaint of the respondent to be ventilated by way of judicial review. Government and/or related agencies' decision on administrative action can be a matter of challenge by the process of judicial review and not one relating to contracts, unless it is in violation of the Federal Constitution or law or public policy or colourable arbitrary exercise of power which will cause or had caused loss to the public as well as to the state exchequer, etc. The challenge must be taken by a member of the public or interested bodies and not generally by a contracting party. We will further elaborate on this issue in this judgment. At times the distinction may be thin and a common sense approach needs to be taken to ensure a commercial vendor does not take benefit (which should rightly go for the ultimate benefit of the public) as opposed to a member of the public who needs the service of the local authority at affordable rates.

[3] There are a number of decisions to support the above proposition in India as well as in Malaysia, notwithstanding the general rule that statutory authorities and/or corporation can do only those things which it is authorised to do by statute. For example:

(a) in *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707, Gopal Sri Ram JCA (as he then was) had this to say:

> *If the activity of the appellant in the private law sphere is called into question, eg the wrongful allotment or issuance of shares, the alleged wrongful removal of a director and the like, then, plainly judicial review will not lie. On the other hand, if the activity complained of falls within the public law environment, then of course judicial review will be available.* (Emphasis added.) and

(b) in *Vijay Kumar Gupta v State of Maharashtra* [2008] (3) All 240, Swatanter Kumar CJ stated:

> 6.4 The scope of judicial review in public contracts or such actions of the State is limited and it is a settled rule that the judicial review will be concerned in reviewing not the merits of the decision made but the decision making process itself. If the contract by State or its instrumentalities has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into the contract. *If the court is of the opinion that public interest has been made to suffer then it would interfere in the larger interest of the public.* (Emphasis added.)

JURISPRUDENCE RELATING TO LOCAL AUTHORITIES AND DOCTRINE OF ULTRA VIRES

[4] The locus classicus case on ultra vires doctrine in relation to local authorities or corporation is the case of *Wenlock (Baroness) v River Dee Co*

(1885) 10 App Cas 354, where His Lordship Lord Watson opined:

> Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.

[5] His Lordship had anchored the argument based on the proposition that what the corporation may legitimately pursue must be ascertained from the Act failing which the doctrine of ultra vires will set in. Over the years the strict rule has been whittled down and the doctrine of ultra vires has also been modified in the company statutes in England, India as well as Malaysia (see s 20 of the Companies Act 1965). In fact, the strict jurisprudence relating to ultra vires doctrine as enunciated in *Baroness* case must now be seen as a ghost of the past in corporate law jurisprudence, and has limited application only to state created corporation, etc.

[6] The position in India as well as England is that the Legislature had not provided extensive power to the local authorities to act as a separate legal entity and in consequence the ultra vires doctrine has been followed to a large extent as enunciated in *Baroness* case and with some general exceptions when the claim is a private law or is a hybrid of private law as well as public law remedy. The learned authors HWR Wade & CF Forsyth in their book titled 'Administrative Law' at p 220 have this to say:

> Public authorities, like other people, frequently acquire powers by contract, for example where a local authority lets houses on lease and under the terms of the lease has power to evict the tenant or to increase the rent. Frequently the contractual power will derive from statutory power such as, taking the same example, the local authority's power to manage its housing estates, and then the rules of administrative law will apply. Where a public body's contracts are made merely in the exercise of commercial liberty, like those made by privatised industries such as electricity or gas, they fall outside administrative law since the ordinary law of contract provides adequate machinery for their enforcement and control.

[7] In Malaysia the Local Government Act 1976 ('the LGA 1976') at least gives two types of powers to local authorities which will be discussed further in the judgment. And s 13 of the LGA 1976 which recognises separate legal entity principle is unique to Malaysia and is not found in England and or India when related to local authorities. In consequence the proposition in *Baroness*' case when it relates to commercial transaction of the local authority and a private party the doctrine of ultra vires will have no application or limited application and it all depends on the facts of the case. Court is most likely to quash the decision of local authority if it ventures into commercial transaction which

exposes them to liability such as giving guarantee, etc as opposed to making use of idle land of the state and generating an income for the public benefit without any exposure of liability as in the instant case (see *Aluminium Company of Malaysia Bhd v Ng Than Chai & Anor* [1994] 3 MLJ 544; [1994] 4 CLJ 97). In abundance of caution, we must say all act of government or public and/or local authorities are always subject to judicial review and/or by way of constitutional challenge even when entering into contract. And when it relates to constitutional challenge, time may not be a factor (see *Racha ak Urud @ Peter Racha Urud & Ors v Ravenscourt Sdn Bhd & Ors* [2014] 3 MLJ 661). If the term of the contract compromises the public right or state exchequer etc; the court is duty bound to strike down the infringing part on the grounds it will be ultra vires or void to exercise the powers to the detriment of the public (see *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623; *Vijay Kumar Gupta*). In consequence, even parties entering into commercial contracts such as the instant case with the government or statutory bodies or its alike must be vigilant not to be a party to a term which is detriment to the public and/or state exchequer, etc; as such contract or term is not worth the paper it is written on.

PRELIMINARIES

[8] The learned judge had written a 30 page comprehensive judgment setting out the facts and law. It will stand as a speaking judgment. However, the judgment has failed to take into account that the issue here involves a contractual deal and not a deprivation or infringement of a right by administrative action that the respondent is entitled in law, to attract the jurisprudence relating to judicial review.

[9] This case, inter alia, involves the jurisprudence relating to temporary occupation licences ('the TOL'), its terms, right to use land for specific purpose per se and the applicability of s 68 of the National Land Code ('the NLC'). And whether s 68 of the NLC in particular 'assignment part' will only apply to private individual or will also be applicable to government and government agencies and also inter related matters between government and its agencies under its umbrella. Section 68 of the NLC reads as follows:

> 68 Temporary occupation licences not capable of transfer or transmission on death.
>
> Except so far as it is otherwise prescribed, a temporary occupation licence shall not be capable of assignment; and every such licence shall, except as provided in s 416, terminate on the death of the person, or dissolution of the body, for the time being entitled to the benefit thereof.

[10] The case here also involves whether the sublicensing agreement offered by the appellant is in breach of s 68 of the NLC.

BRIEF FACTS

[11] The appellant is a local authority and the respondent is involved in erecting outdoor advertising billboard and earning an income through its clients who place the advertisement on the billboard. The case concerns the licensing of an outdoor advertising billboard built by the respondent on a state land. It must be noted that 'billboard business' is a lucrative business for the operator and these can be seen from many reported decision from the court and also news published in the public media (see *Capital Billboards Sdn Bhd v Asia Posters Sdn Bhd & Ors* [2012] MLJU 385).

[12] The legal framework governing the operation of billboard business as set-out by the respondent can be summarised as below:

(i) for state land temporary occupation licences ('the TOL') is obtained from the land administrator, pursuant to ss 65–67;

(ii) planning permission is then obtained from the appellant pursuant to ss 19–21 of the Town and Country Planning Act 1976;

(iii) a structural permit is then obtained from the appellant, renewable every year, pursuant to the Uniform Building By-Law 1984 issued under the Street, Drainage and Building Act 1974; and

(iv) an advertisement license, renewable every year, is obtained from the appellant pursuant to the advertisement (Subang Jaya Municipal Council) By-Law 2007 issued under the Local Government Act 1976.

[13] It is not in dispute the above was the modus operandi of billboard business from early 2006–2008 between the land administrator, the relevant authorities and the respondent. The complaint of the respondent in essence is related to item (i) above. The complaint of the respondent before the learned judge is well articulated by learned counsel for the respondent in their submission. Much judicial time will be saved by repeating it verbatim and it reads as follows:

> 6. On 26-8-2008 the Selangor State Government issued a circular (amended on 31.3.2009) ('Circular') to its local authorities (not the respondent).
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> 7. A reading of the circular will show that all applications for TOLs could no longer be made by the respondent/other billboard operators but would rather be made by the local authority, in this case the appellant to the Land Administrator. Billboard operators would then be required to rent the land/site from the local authority. If a billboard operator refuses to do so, the local authority would issue a notice of eviction and demolish the existing structure and offer the site to another billboard operator. The rental rate was to be at least 30% (later amended to 25%) of the revenue earned on the particular billboard.

A 8. The object of this new policy was ostensibly to reduce landscape pollution and accident risks caused by the proliferation of billboard, yet the Circular also made reference to the need to increase income for local authorities. What is most telling as to which object was the primary object is paragraph 3.1.4 of the Circular which states:

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> PBT diminta berunding dengan pemilik structure sedia ada supaya menyewa tapak struktur daripada PBT. Sekiranya pemilik struktur enggan berbuat demikian, PBT hendaklah mengeluarkan notis mengosongkan tapak atau merobohkan struktur tersebut dan tapak tersebut boleh ditawarkan kepada pengusaha papan iklan lain.

C 9. As far as the respondent was concerned, notwithstanding the policy, there was no change implemented for more than a year.

10. On 6.11.2009, the respondent received a letter from the appellant charging a sum of RM254,600.00 as 'Bayaran Perkongsian Tapak' for the year 2009, in addition to the annual fee of RM32,000.00 for TOL, Structural Permit and Advertising License.

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11. The respondent was shocked and refused to pay. After various correspondences the appellant as to the scope and reason for these charges, the total payable amount was reduced to RM189,400.00 then to RM63,000.00 and finally to RM33,000.00. The respondent paid this final amount as it was approximate to what it was paying previously and it was also clarified that his amount included the charges for the necessary licences and permits. In a letter dated 31 December 2009, the appellant acknowledged that the reduction to RM33,000.00 was on the basis that the respondent had the necessary TOL from 2006 and 2008 and has paid all other payments due to the appellant.

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12. On 9.8.2010, again after a silence of about 8 months, the appellant made an offer to the respondent, this time for tenancy of the Site ('Offer Letter') containing a different permutation. The rental to be charged was the higher of either (i) 25% of the respondent's gross annual advertising income from the Site ('25% levy') plus the TOL fee of RM3,000.00 or (ii) a fixed fee of RM33,000.00. On 19.8.2010, the respondent wrote to the appellant again on the premise that there was in substance no change to the charges being imposed on it accepted the offer and enclosed payment of RM33,000.00 for year 2010.

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13. In early 2011, the appellant asked to be furnished with the respondent's contract with its customers to determine if RM33,000.00 or 25% levy was applicable. The respondent replied by letter stating that it would pay whatever was prescribed by law and enclosed payment of RM33,000.00 which the appellant accepted on 16.2.2011.

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14. However, 6 months later the appellant issued a letter directing the respondent to attend at the appellant's office within 14 days for the purpose of entering into an agreement with the appellant. The agreement was not provided and only upon respondent's request did the respondent subsequently receive a draft copy of what was described as Billboard Site(s) Sublicence agreement ('Sublicence agreement') which provided for the imposition of 25% levy plus the TOL fee or RM33,000.00, whichever is higher.

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15. The Sublicence agreement also contained other terms which were illogical, unfair, prejudicial to the respondent, where the appellant conferred upon itself the rights inter alia to have a say in the respondent's company shareholding. Clause 8 provides that as long as the Sublicence agreement is in subsistence, the respondent must obtain the appellant's consent before changing its ownership structure and shareholding; Clause 4.3 requires the respondent to deliver up its management accounts, balance sheets, profit and loss statements; Clause 4.4 allows for variation, review and increase of fees at the absolute discretion of the appellant; Clause 6.1(a) requires the respondent to undertake to pay its taxes. Noteworthy is also Clause 25 which states that the relationship is not a partnership or Joint Venture in stark contradiction to the 2009 position of 'perkongsian tapak'.

16. Given the manifest unreasonableness of the Sublicence agreement, the respondent tried to seek clarifications from the appellant on the terms but to not avail.

17. Eventually the appellant issued a letter dated 01.12.2011 warning that the appellant would revoke its offer and evict the respondent from the Site if the Sublicence agreement was not signed. The respondent in fact filed a Judicial Review application based on this decision but at the leave stage the Attorney General's office objected to it on the grounds that it was premature as the final decision was that communicated on 26.4.2012 where the appellant wrote to withdraw the offer with immediate effect and the respondent was given an ultimatum of 30 days to remove its billboard structure because of the respondent's failure to execute the Sublicence agreement.

18. The learned Judge was satisfied that the three grounds put forward by the respondent had been made out, namely that in imposing the Sublicence agreement on the respondent, the appellant:

(i) Had acted ultra vires its powers;

(ii) Had acted illegally and/or in contravention of the law;

(iii) Had acted unreasonably, grossly disproportionately and was motivated by factors which are irrelevant.

19. For reasons to be set-out below, we submit that the learned Judge had come to the right decision in allowing the respondent's application for judicial review and we respectfully invite this Honourable Court to dismiss the present appeal by the appellant.

[14] The appellant has filed a lengthy memorandum of appeal even though at the opening of the submission they have limited their arguments to the issues relating to the circular and illegality relating to s 68 of the NLC. For purpose of deliberation, we have taken the liberty to reproduce the relevant parts of the memorandum of appeal verbatim. The complaint in the memorandum of appeal reads as follows:

(1) The learned Judge erred in law and fact in allowing the respondent's application for judicial review, and in particular in:

(i) Declaring that any Sub-License Agreement in the terms of the

Billboard Site(s) Sublicence agreement ('Sublicence agreement') would be invalid and void ab inito.

(ii) Declaring that the appellant did not have the capacity to enter into a contract in terms of the Sublicence agreement.

(iii) Declaring that the appellant was not entitled to use the contractual mechanism or any mechanism which involved the sharing of the respondent's income as a basis for the grant of any license/consent/approval to the respondent to enable the respondent to carry out or continue outdoor advertising business at the Site upon the reserve land adjacent to the Hindu temple at Lot 6215, Persimpangan Persiaran Kewajipan and the Shah Alam Highway, Subang Jaya, Mukim Damansara, Daerah Petaling, Selangor ('Site').

(iv) Declaring that the respondent was not entitled to enter into any Sublicence agreement with the respondent which contained terms which were the same or materially the same as those contained in the Sublicence agreement, in particular but not limited to the terms in clauses 3.5(b) & (c), 4.3, 4.4, 6.1(a), (b) & (k), 8 and 23.1 thereof ('Disputed Clauses'); and

(v) Granting a mandamus to compel the appellant to take the necessary steps to allow the respondent to continue its outdoor advertising by means of its billboard at the Site for 2012 and the following years on the same terms or materially the same terms as those in 2007 to 2011.

(2) The Learned Judge erred in law and in fact in failing to hold that as the respondent had neither initiated any proceedings to challenge the Circular of the Selangor State Secretary (Local Authorities Section) which outlined the Policy and Guidelines for the Construction of Billboards for Local Authorities in the State of Selangor dated 26.08.2008 and the Circular of the Selangor State Secretary (Local Authorities Section) dated 31.03.2009 ('Circulars'), nor named the Selangor State Government as a party to the proceedings below, it was barred from questioning their legality and effect.

(3) The Learned Judge erred in law and fact in failing to consider the following facts:-

(i) The judicial review proceedings and the relief claimed by the respondent were expressly and specifically confined to the Sublicence agreement which was entered into between the appellant and respondent pursuant to the Circulars.

(ii) Even if the respondent had challenged the Circulars in separate proceedings (which it had failed to do), the court was not likely to have attempted to form an opinion on their soundness or legality.

(iii) The Selangor State Government substituted the old scheme for licensing outdoor advertising ('Old Scheme') with a new scheme ('New Scheme') by way of the Circulars to solve the problem of the proliferation of billboards, (many of them illegal) throughout the state which polluted the landscape and jeopardized the safety of road-users.

After carrying out a study of the problem, the state decided that the most efficient and fairest mechanism of licensing was to require the local authorities (instead of the advertisers) to obtain the temporary occupation license ('TOL') for the billboards sites and permit the advertisers to use the sites for fees representing a reasonable proportion of the income derived by the advertisers from the use of the sites, and then use such collected fees towards its revenue for the public good.

(iv) Whereas the local authority can in theory increase its income from its licensing of outdoor advertising activity under the New Scheme, the facts show that the appellant did not follow the Circulars to the letter but instead continued to consider applications for the relevant approvals and licenses with its discretionary powers intact and unfettered.

(v) By the respondent's own calculation, the total fee payable yearly under the Old Scheme was approximately RM32,500.00 whereas the fee paid by the respondent under the New Scheme for the years 2009, 2010 and 2011 was RM33,000.00 for each year and hence the respondent did not suffer any disadvantage under the New Scheme.

(vi) lf the new policy raised questions of legality and even ethics, given the complete absence of evidence on such issues, the court was not equipped to answer them and such questions could only be answered in separate proceedings against the Selangor State Government.

(vii) The Circulars constitute administrative quasi-legislation which is directly addressed to the local authorities in Selangor, including the Appellant and therefore bind the Appellant local authority.

(viii) The Circulars amount to directions issued by the Selangor State Government pursuant to section 9 of the Local Government Act 1976 which the Appellant is duty-bound to observe.

(ix) No evidence was adduced by the Respondent to show that the Circulars were ultra vires the powers conferred on the Selangor State Government; unreasonable; or illegal.

(4) The Learned Judge erred in law and fact in holding that the imposition of the Sublicence agreement by the Appellant on the Respondent was ultra vires when the power to do so is expressly conferred or derived by reasonable implication from the provisions of the Local Government Act 1976, in particular sections 9, 13, 36, 39 and 101(s) and (ff) thereof, or the same may be regarded as having been carried out pursuant to powers incidental to or consequential upon the powers expressly stated therein.

(5) The Learned Judge erred in law and fact in holding that the imposition by the Appellant of an annual sublicence fee of 25% of the gross annual income of the Respondent (together with the TOL fee of RM3,000.00) or the sum of RM33,000.00, whichever is the higher, is not a permitted revenue under the Local Government Act 1976.

(6) The Learned Judge erred in law and fact in finding that the insertion by the Appellant of clauses 8, 4.3, and 6.1 (a) & (b) in the Sublicence agreement was not within the terms of its powers under the Local Government Act 1976 or any by-laws and that such powers were not within the bounds of its statutory purpose or within the contemplation of its statutory powers.

(7) The Learned Judge erred in law and fact in failing to hold that any contract which the Appellant enters into with the Respondent must contain terms which ensure that: the public interest is at all times secured; the Appellant's discretionary powers are not contracted away; and the Appellant is able to determine the full fees that are payable by the Respondent, and further the Learned Judge erred in failing to hold that the Disputed Clauses are consistent with the aforesaid purpose.

(8) The Learned Judge erred in law and fact in holding that the right being licensed out by the Appellant to the Respondent is the right to occupy the Site and the Sublicence agreement is in fact an arrangement to circumvent section 68 of the National Land Code 1965; that the Respondent has acted ultra vires its powers; and that the Sublicence agreement is therefore illegal, null and void.

(9) The Learned Judge erred in law and fact in failing to consider that:

(i) the Federal Court in *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121 has clearly used the words 'assignment' and 'transfer' interchangeably and the prohibition in section 68 of the National Land Code 1965 would only come into play in the case of an outright sale or transfer or assignment of the Appellant's TOL to the Respondent; and

(ii) in this case, the 'permission' to use the Site is restricted to the activities outlined in Clause 3.1 (a) to (e) of the Sublicence agreement i.e. the Respondent was only allowed to enter the Site and install and maintain the billboard and there was no outright sale or transfer or assignment of the TOL.

(10) The Learned Judge erred in law and fact in failing to hold that the Appellant's Letter of Offer dated 9.8.2010 and the Respondent's Letter of Acceptance dated 19.8.2010 constituted a contract ('Contract') made between the aforesaid parties on the terms and conditions set-out in the Appellant's Letter of Offer dated 9.8.2010.

(11) The Learned Judge erred in law and fact in failing to give any or any due consideration to the fact that:

(i) the Respondent's failure to obtain Planning Permission and the Structural Permit and Advertising Licence amounted to a breach of the condition in paragraph 2.7 of the Appellant's Letter of Offer dated 9.8.2010; and the failure to sign the formal Sublicence agreement amounted to a further breach, in particular, paragraph 213 of the said Letter of Offer; and

(ii) the Appellant's decision to terminate the Sublicence agreement by its

Letter of Termination dated 26.4.2012 was lawful, reasonable and fair in view of the Respondent's failure to obtain the said necessary approvals and license and failure to execute the formal Sublicence agreement, both of which amounted to a breach of the Contract.

(12) The Learned Judge erred in law and fact in failing to hold that the decision of the Respondent to exercise its contractual right to terminate the Contract by way of the Letter of Termination dated 26.4.2012 pursuant to the breach of the terms of the Contract by the Applicant, is not an administrative decision which is amenable to judicial review.

(13) The Learned Judge erred in law and fact in failing to hold that the Disputed Clauses are valid for the following reasons:-

(i) Both parties had already entered into a concluded agreement as evidenced by and contained in the Appellant's Letter of Offer dated 9.8.2010 and the Respondent's Letter of Acceptance dated 19.08.2010.

(ii) The Disputed Clauses correspond with the terms of the Appellant's Letter of Offer dated 9.8.2010 which had already been accepted by the Respondent.

(iii) The Disputed Clauses do not contain terms which are unreasonable, unfair or unduly favourable to the Appellant and in fact are necessary to enable the Appellant to implement the New Scheme as contemplated by the Circulars.

Wherefore the Appellant prays that its appeal herein be allowed with costs and for such other orders as ought to be made in the interests of justice.

[15] We have read the appeal record and the submissions of the parties in detail. We take the view the appeal should be allowed. Our reasons, inter alia, are as follows:

(a) the LGA 1976 gives the local authority at least two types of powers. One to function within the provision of the Act in matters relating to the local authority and the public. When exercising this power it is trite that it can only act according to the laws that govern it and the decision will be subject to judicial review (see *Generation Products Sdn Bhd v Majlis Perbandaran Klang* [2008] 6 MLJ 325). This power and its limits was articulated by Edgar Joseph Jr J (as he then was) in *Penang Development Corporation v Teoh Eng Huat & Anor* [1992] 1 MLJ 749:

> Unlike a natural person who can in general do whatever he pleases so long as what he does is not forbidden by law or contrary to law, a statutory corporation can do only those things which it is authorised to do by statute, directly or by implication. If such a corporation acts otherwise than in this way its acts are ultra vires. There must in all cases be statutory authority for what is done, and that authority must either by expressly given or reasonably inferred from the language of an Act of Parliament. (Emphasis added.),

(b) the other power given under s 13 of the LGA 1976 to local authorities is the power of a body corporate and that will be the powers vested in any corporation and has nothing to do with public rights or obligations or interest. This section was not addressed in the *Penang Development Corporation*'s case and in consequence the case has limited application to the facts of the instant case though the court acknowledged that Parliament can give such powers to local authority. As a general rule, a body corporate, if separate legal entity principles apply, can enter into any form of transaction with private parties on such terms and conditions, etc. And such matters if it is a state corporation will usually be a policy matter in relation to state authority or local authority by the state government, etc. Such powers exercised as body corporate cannot be challenged by way of judicial review (except for reasons stated in the early part of the judgment). This can be 'expressly or reasonably inferred' in s 13 of the LGA which gives the powers of separate legal entity principle in line with the principles enumerated in *Salomon v A Salomon & Co Ltd* [1897] AC 22. The said section reads as follows:

> 13 Every local authority shall be a body corporate and shall have perpetual succession and a common seal, which may be altered from time to time, and may sue and be sued, acquire, hold and sell property and generally do and perform such acts and things as bodies corporate may by law do and perform,

(c) s 13 as said earlier is unique to Malaysia. For example, s 4(2) of the Chennai City Municipal Corporation Act 1919, restricts the separate legal entity principle. That s 4(2) reads as follows:

> 4(2) The Corporation shall be a body corporate with the name aforesaid having perpetual succession and a common seal with power, *subject to the provisions of this Act*, to acquire, hold and dispose of property and may by the said name sue and be sued. (Emphasis added.)

Another example, in s 3(2) of the Madurai Municipal Corporation Act 1971 reads as follows:

> 3(2) The Corporation shall by the said name be a body corporate, shall have perpetual succession and a common seal and *subject to any restrictions or qualifications imposed by this Act or any other enactment*, shall be vested with the capacity of suing or being sued in its corporate name, of acquiring holding or transferring property movable or immovable, of entering into contracts and of doing all things necessary for the purpose of its constitution. (Emphasis added.),

(d) both the Municipal Corporations are situated in Tamil Nadu and the Legislature had deemed it fit to give different definitions to powers of the corporation. In essence, the ultra vires doctrine enunciated in *Baroness*' case will apply in the Indian jurisdiction with certain exceptions created by case laws as stated earlier. Our s 13 of the LGA 1976 gives much wider powers. The distinction is like apple and orange in contrast to the

position in England and India taking into consideration that Parliament does not enact anything in vain;

(e) the public function of local authorities and its function as a body corporate (legal entity) must be distinguished. The function of a body corporate is not synonymous with the function of local authorities. The respondent's argument that there is no single express provision allowing the appellant to enter into the business of renting TOLs to billboard operators cannot be correct. Being a separate legal entity, they can enter into commercial contracts but it will be subject to the control of the state government and/or state authority itself and the policy of the day. If such policy consideration relates to private contracting parties as opposed to public then as a general rule it will not be amenable to judicial review;

(f) it is well established that judicial review of administrative actions is permissible on the ground of illegality or irrationality or procedural impropriety (see *Chong Chung Moi @ Christine Chong v The Government of State of Sabah & Ors* [2007] 5 MLJ 441). Commercial contracts will not fall under the jurisprudence of judicial review. Further, administrative decision involving policy decision has been put on a different pedestal. The learned authors of *Judicial Power or Judicial Review* (2012) at p 664 on this issues states:

> Though they are not totally immune from judicial review, yet certain grounds which are available in the case of administrative decisions not involving policy considerations are not open for challenging the policy decisions. Since courts do not sit as an appellate authority over the policy considerations, it cannot see correctness, suitability and appropriateness of the policies.
>
> In *Directorate of Film Festivals v Gaurav Ashwin Jain* AIR 2007 SC 1640, the Supreme Court pointed out that the court cannot interfere with the policy either on the ground that it is erroneous or that a better and fairer alternative is available. The executive has authority to formulate the policy and the court can interfere with it only if it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution or opposed to a statutory provision. (See *Jitendra Kumar v State of Haryana* [2008] 2 SCC 161),

(g) for the respondent to succeed by way of judicial review, it must demonstrate, inter alia, at least one of the following: (i) it violates the fundamental rights of the citizen; (ii) breach of constitutional provision; (iii) breach of statutory provision; and (iv) arbitrary exercise of power to the detriment of public, etc. Mere contractual disadvantage is not enough; and

(h) on the issue of illegality, the complaint of the respondent is sublicensing agreement relates to TOL and s 68 does not permit the TOL holder to assign the right for a rent. And the respondent before the learned judge had relied on the following cases: (i) *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121; (ii) *United Overseas Bank (M) Bhd v*

Mok Hue Huan & Anor [2010] 7 MLJ 293; (iii) *Ang Toon Chew & Sons (M) Sdn Bhd v Personal Representatives of Mohamed Taib bin Yosoff, deceased* [1998] 5 MLJ 481; (iv) *Marble Terrazzo Industries Sdn Bhd v Anggaran Enterprise Sdn Bhd & Ors* [1991] 1 MLJ 253; (v) *Murugesan v Krishnasamy & Anor* [1958] 1 MLJ 92. What is important to note is that all these cases have nothing to do with the state authority or local authority. Further, in our view 'assignment' in s 68 is intended for the purpose of the public and has nothing to do with government bodies such as the local authority. The parties have not furnished to us any cases that s 68 assignment will be applicable also to local authority. On this issue, the learned judge had concluded as follows:

> In all the circumstances aforesaid, the court is satisfied that the right being licensed out by the respondent to the applicant is the right to occupy the billboard site — the land over which the licence under the TOL is issued. The sublicence agreement is in fact an arrangement to circumvent s 68 of the NLC which prohibits the assignment or transfer of the TOL to any third party.
>
> In consequence, the respondent had acted ultra vires its powers when it sought to impose the sublicence agreement on the applicant. Further, for being in express contravention of s 68 of the NLC, the purported assignment of the TOL under sublicence agreement is illegal, null and void.
>
> By reason of the aforesaid can it be said that the respondent had improperly exercised its discretionary powers. This question can be answered by reference to background facts set-out earlier. When previously the fees charges for the billboard were about RM33,000, the new fees sought to be imposed comes close a quarter million. The terms in the sublicence agreement relating to the control of the applicant's shareholding, delivery of audited accounts and undertaking to pay taxes, are with respect rather arbitrary and not within the scope or contemplation of the respondent's powers under the LGA and bye laws. It is also pertinent to consider the fact that the applicant had been occupying the 'Billboard Site' since 2007 and has invested substantial sums in obtaining the necessary approvals, licences and permits including the construction of the billboard structure. What the respondent sought to do under the sublicence agreement was an entirely different and distinct scheme altogether; it sought in one breath to disenfranchise the applicant as the TOL holder to its right to apply for a renewal of its TOL; instead, the local authority would be issued the TOL. The respondent would then sublicence the TOL to the applicant and charge a 25% fee on the gross revenue. This scheme does not appear to be contemplated within the LGA or by laws. It is also illegal for being in contravention of s 68 of the NLC.

[16] We have read the sublicense agreement several times. The recitals 1.1 do not say in certain terms that the appellant had obtained TOL but what is clear is that the appellant posses the requisite legal rights in respect of the land and the respondent will be given a license to erect the billboard and not 'occupy

land' (at the exclusion of others) as in the case of TOL is granted under s 68. The sublicense agreement is not an assignment of any rights as alleged by the respondent to attract s 68 of the NLC. The recital 1.1 of the agreement says as follows:

> MPSJ has obtained or is in the process of obtaining a temporary occupation licence ('TOL') and/or possess the requisite legal rights in respect of all that piece/all those pieces of land more particularly described in Section 3(a) of the First Schedule hereto (collectively, 'Billboard Site(s)'). The list of the Billboard Site(s) and a copy of the Pre-Com Plan(s) is/are annexed hereto as 'Annexure A'.

[17] As we stated earlier, a sublicense in the instant case has nothing to do with s 68 relating to assignment for the court to invoke s 68 of the NLC and say it was 'illegal'. The definition of sublicense in the agreement reads as follows:

> 'Sub-Licence' means the permission granted by MPSJ to the Sub-Licensee pursuant to Clause 3.0 of this Agreement for the sole purpose of displaying Billboards and is revocable at any time by MPSJ without prior notice and the Sub-Licensee has no legal redress for such revocation.

[18] TOL mentioned in the sublicensing agreement cannot be equated to TOL under s 68 of the NLC as the definition is precarious in that it does not say in uncertain terms the appellant has obtained a TOL and is assigning the TOL to the respondent. The definition of TOL under the sublicense agreement is defined as follows:

> 'TOL' means the temporary occupation licence which MPSJ has obtained or is in the process of obtaining.

[19] This definition is not the same as the definition of TOL in the National Land Code. Temporary occupation license is defined under s 5 of the NLC and means 'a license issued under Chapter 2 of Part Four of the NLC which relates to ss 65–69 of the NLC. Section 65 makes it clear that the State Authority can give TOL. And state authority means under the definition the 'Ruler or Governor of the State'. It is trite the Executive Head of the State Government is the 'Ruler or Governor of the State' as the case may be (see the Constitution of Selangor 1959). All local authorities of the state government come within the exclusive jurisdiction of the state government. This means state government has wide powers to control the local authorities and to ensure their effectiveness and efficiency. In article titled 'Introduction to Local Government in Malaysia', the author Dilly M Hill (1974) observes:

> In Malaysian context, report by Royal Commission of Inquiry stated that local government could see as below:
>
> (a) Representing the third tier in federal structure
>
> (b) Administered by state nominated councillors

(c) Geographically encompassing a portion of the country

(d) It is infra-sovereign

(e) Subordinate and subject to the control of the state (limited of financial and administration issues

(f) It is a separate legal unit/entity from higher government or other local authorities.

(g) Has power to sue and be sued.

(h) Provide obligatory and discretionary to provide goods and services.

1.2 Concept of local government

I. Local Government is responsible on the local affairs just like what the state and federal government had set.

II. The status of the Local Government is much lower than the state and federal government.

III. The Local Government autonomy in administering aspect is set by the state and federal government.

IV. The Local Government has the power to sue or be sued, to sign or agree on contracts and to gain properties.

V. It is responsible to give service to the public that lives in the area that is set by the federal and state government.

1.3 Features/characteristics of local government

According to Phang Siew Nooi, there are a few factors that has been determined the characteristics of local government in Malaysia which can be seen as follows:

1. Local Government has its *own territory* whereby the border is officially recognized by the law. Law divides it equally.

2. Local Government has its *own population*. L.G is responsible to develop the area for the benefits of the locals in that area. e.g. In term of facilities/infra–structure.

3. Local Government is *an institution*, which is established under special law. Superior government controls it.

4. Local Government carried out their function by following the law provided they *can be sued, can sue, have properties, and can signed-agreement or contract*.

5. It is *infra–sovereign*. It means that Local Government is eligible to the local law. e.g. — limited power and duty; — No supreme.

6. It is a *separate legal entity*. It means that although it is part of government but still an independent body.

7. *Representatives* are either appointed by the higher authority or elected by the local people.

8. Yang Di Pertua (YDP) works together with council member and was elected by the State Government.

9. Carries out main *functions* such as cleanliness services, health services and security.

10. Local Government *powers* are to impose tax, penalty to those who disobey their order, appoint their staff, and autonomy in terms of financial administration of its body.

(Emphasis added.)

[20] Local governments are usually referred to as 'Majlis' and the appellant is a local government and is subject to the LGA 1976 as per the Interpretations Act 1948 and 1967. 'Local authority' means any municipal council, town council, town board, local council, rural board, sanitary board or similar local authority established by a written law.

[21] What is important to note in our case in respect of ultra vires doctrine is the power of the state authority to control the local authorities, in this case the appellant. If the state authority act is ultra vires any of the law, the challenge must be against the decision of the state authority and not the local authority. In the instant case, the challenge on s 68 and the circular issued on the ground of ultra vires doctrine (if any) cannot be taken against the local authorities in view of s 9 of the LGA 1976.

[22] In addition, cl 3.0 of sublicensee agreement is only a restricted right of user and it reads as follows:

... which permission is restricted to the right to:

(a) enter the Billboard Site(s) at the Sub-Licensee's risk;

(b) construct, finance, complete and equip the Billboard Site(s) at the Sub-Licensee's own cost and expense;

(c) carry out the Works at the Billboard Site(s), subject to the provisions of this Agreement;

(d) administer, operate, manage, utilize and maintain the Billboard Site(s); and

(e) enter into a contract or arrangement with any third party to enable the Sub-Licensee to levy, collect and retain for its own benefit income derived from the Billboard Site(s), subject always to payment of MPSJ's Entitlement to MPSJ.

[23] It is difficult even to fathom how the restricted right of user even in the event the TOL had been given to the appellant will amount to a transfer or assignment under s 68 for the respondent to argue that the terms of the sublicense agreement is in breach of s 68 and sustain the ground of illegality to quash the decision (see *Paruvathy d/o Murugiah v Krishnan s/o Doraisamy* [1983] 2 MLJ 121). In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, Chang Min Tat CJ had this to say:

The transaction merely involved the taking over by one contractor from another

A contractor of contract works for and with the consent of Sugut Enterprise Co Sdn Bhd. A TOL is not the same as a timber licence as the former is issued by the Land Office under the provisions of the Sabah Land Ordinance. It is difficult to see how the transaction between two contractors not involving any transfer of rights under a timber licence could be said to be illegal. The appellant tried all he could to get the B Assistant Collector of Land Revenue to grant a TOL to the respondents. Until the TOL was cancelled, the respondents had been using the road and houses under it. Although the TOL is not transferable the statute does not prohibit letting of a house built on land held under a TOL. The letting on rent does not amount to a transfer of a licence and is not illegal. In *Govindaraju v Krishnan* [1962] 1 MLJ 334 and *Ban* C *Seng v Yap Pek Soo* [1967] 2 MLJ 156 the appellant never transferred the TOL to the respondent. All the appellant did was to permit respondent to use his rights under that TOL. There was nothing illegal about such an arrangement.

And in the same case, Lee Hun Hoe CJ (Borneo) had this to say:

D ... But there is a difference between the transfer of the rights contained in a licence and permitting the use of it. Thus a monthly letting of two rooms in a house built on state land under a TOL which was not transferable, is not prohibited by statute or made illegal by the non-transferable provision: per Ismail Khan J (as he then was) in *Govindaraju v Krishnan* [1962] 1 MLJ 334 at p 335, followed in *Ban Seng v Yap Pek Soo* [1967] 2 MLJ 156.

E In my view and with respect, the contention of the appellant that what cl 9 says was that the appellant shall permit the respondent 'to take over and use' the road within the TOL issued by it, and that this was not a transfer of rights but a permit to use and therefore not illegal as against the non-transferability provision is correct.

F

[24] In our considered view, there will be no prohibition for the appellant to enter into the sublicense agreement and collect whatever consideration it deems fit and with whatever terms as a body corporate. The act of the appellant is further legitimised by the policy and guidelines circular dated 26 G August 2008 and its subsequent amendment. The said circular is authorised by law pursuant to s 9(1) of the LGA 1976 which reads as follows:

9(1) The State Authority may from time to time give the local authority directions of a general character, and not inconsistent with the provisions of this Act, on the policy to be followed in the exercise of the powers conferred and the duties imposed H on the local authority by or under this Act in relation to matters which appear to the State Authority to affect the interests of the local authority area, and the local authority shall as soon as possible give effect to all such directions.

[25] Section 9 of the LGA 1976 must be read with s 5 of the National Land I Code, which places state authority in control of land matter, in particular TOL even though the issuing authority of the TOL will be land administrator, etc, under the umbrella of the state authority. We do not see how the lawful exercise of powers vested in the state authority and the issuance of circular will be ultra vires or illegal for the court to quash the decision on those grounds, more so

when the state authority or state government is not a party to the action. The submission of the appellant on this issue has merits. And that part of the submission, inter alia, reads as follows:

> Even if the respondent company were to challenge the Circulars in separate proceedings, the court is not likely to attempt an opinion on its soundness or legality, if that is what is being challenge by the respondent company.
>
> In *Gillick v West Norfolk AHA* [1996] 1 AC 112, the House of Lords upheld a memorandum of guidance on family planning services which contained a section dealing with contraceptive advice and treatment for young people. The court held that in cases where any proposition of law implicit in a departmental advisory is interwoven with questions of social and ethical controversy, the court should exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision.

[26] We do not see why the payment for the user of the license by a commercial vendor for commercial purpose need to be restricted in any manner as it should be rightly determined by market forces. In the instant case, we also note that the appellant had given much concession and reduced the fees and the conduct of the appellant cannot on the facts be stated as arbitrary or oppressive or unfair in the common sense. The respondent has not furnished us any authorities by commercial user for commercial purpose of state land where the consideration and terms were arbitrary or disproportionate and stood as a ground for challenge by way of judicial review. In addition, we must say that when dealing in commercial transaction with commercial vendor within the powers set-out in s 13 it will be a prudent exercise for the appellant to place any terms and conditions in the best interest of the public to ensure that appropriate consideration is collected from the respondent and to demand transparency of accounts, etc (which the respondent complains) to ensure that there is no default in payment by respondent. In essence, court should not interfere or be slow to interfere with any commercial deals more so when the revenue will benefit the public unless the issue really involves the responsibility of the local authority to the public.

[27] We are of the considered view notwithstanding the well reasoned and speaking judgment of the learned trial judge, the respondent has not made out a case for judicial review on the grounds that the terms imposed by the appellant in the sublicensing agreement are:

(a) ultra vires its powers;

(b) an agreement that is illegal and/or in contravention of the law; and

A (c) acting unreasonably, grossly disproportionate and motivated by factors which are irrelevant.

[28] For reasons stated above, the appeal is allowed. The judgment of the High Court is set aside, with costs here and below.

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[29] We hereby order so.

Appeal allowed with costs here and below.

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Reported by Afiq Mohamad Noor

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